

1 BARRY J. PORTMAN
 Federal Public Defender
 2 STEVEN G. KALAR
 Assistant Federal Public Defender
 3 450 Golden Gate Avenue
 4 San Francisco, CA 94102
 5 Telephone: (415) 436-7700
 6 Counsel for Defendant Ashiegbu
 7
 8
 9

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,)	No. CR 07-0654 CRB
)	
13 Plaintiff,)	DEFENDANT'S RESPONSE
)	TO GOVERNMENT'S
14 v.)	LETTER AND EXHIBIT LIST
)	
15 LINDA ASHIEGBU and EMMANUEL)	
16 ANYANWU,)	Status Conference Hearing
)	Date: Wednesday, April 23,
17 Defendants.)	2008 at 2:30

19
 20 By volunteering to provide a case summary and the exhibit list at the March 26,
 21 2008 status conference, the government helped to sharpen issues that need resolution,
 22 moot others that do not, and generally informed the Court as to the nature of the two cases
 23 before it. *See Letter of AUSA Danner to the Hon. Stephen G. [sic] Breyer*, Apr. 4, 2008.
 24 The government is to be commended for its filing, and AUSA Danner should encourage
 25 her colleagues to adopt this enlightened approach in more cases.

26 This response to the government's filing on behalf of Linda Ashiegbu elaborates
 27 on the government's summary of the case, concedes that certain defense motions have
 28

1 been mooted by the April 4th filing,¹ and identifies other motions that will still need
2 resolution when the parties return to Court.

3 Discussion

4 Assuming without conceding that all of the government's allegations are true, this
5 case involves two U.S. citizens helping two Nigerian family members unlawfully enter
6 and stay in the United States. No defendant has any prior convictions. The government's
7 April 4th letter and evidence list makes no allegations of financial gain, and contains no
8 allegation that the Ashiegbu's helped *other* aliens besides Linda Ashiegbu's siblings. If
9 true, the defendants' lies to ICE agents about these two siblings should be the subject of
10 hearings in Immigration Court, might appropriately be the subject of prosecution in
11 magistrate court, but should not be the subject of two felony trials in federal district court.

12 I. Overview of Case

13 The government's summary of the case in its April 4 letter was helpful the Court
14 and the parties. In the spirit of that letter, the defense supplements that discussion with a
15 description of the sentencing exposures of these three defendants² under the federal
16 Sentencing Guidelines.³

18 ¹ On April 4th AUSA Danner filed separate letters: one relating to *United States v.*
19 *Linda Ashiegbu and Emmanuel Anyanwu*, and the second relating to *United States v.*
20 *Doris Anyanwu and Andrew Ashiegbu*. In this response, all references to the "April 4th
letter refer to the *Linda Ashiegbu* letter.

21 ² Emmanuel Anyanwu (Ms. Linda Ashiegbu's brother and co-defendant) is a
22 fugitive and has been since the outset of this case in 2007. There is apparently no
23 immediate prospect of his arrest and it is unlikely that he will not be present for trial
24 before this Court. As a fugitive, Mr. Anyanwu's guideline range may differ from those of
the three other co-defendants and family members.

25 ³ The Guidelines are, of course, advisory. *United States v. Booker*, 543 U.S. 220
26 (2005). As the Ninth Circuit has explained, however, "All sentencing proceedings are to
27 begin by determining the applicable Guidelines range. The range must be calculated
correctly. In this sense, the Guidelines are 'the 'starting point and the initial benchmark,'
28 *Kimbrough*, 128 S.Ct. at 574 (quoting *Gall*, 128 S.Ct. at 596), and are to be kept in mind
throughout the process, *Gall*, 128 S.Ct. at 596-97 n. 6. *United States v. Carty*, __ F.3d

Guideline Section 2L2.1 applies to this offense. That guideline provides the following offense level calculation:

Base Offense Level: The base offense level is found at USSG § 2L2.1(a)	11
Specific Offense Characteristics: Under USSG § 2L2.1(b), “If the offense was committed other than for profit . . . decrease by 3 levels.	-3
Subtotal Offense Level:	8

As noted above, none of these defendants have any prior convictions. They are accordingly all in Criminal History Category I.

At Criminal History Category I, Offense Level 8, the guideline range is 0-6 months *after trial* – in Zone A of the guideline table. By promulgating guidelines that establish a non-custodial, Zone A range after trial for this alleged offense, the Sentencing Commission has clearly opined on the “seriousness of the charges now brought before this Court.

As noted above, the guideline range is so low that the reduction for acceptance of responsibility is not relevant: the range is 0-6 months in Zone A before *or after* trial. Moreover, the traditional leverage that the government enjoys to force pleas well before trial – its motion for the “third point for acceptance of responsibility – is not at issue because the offense level is below sixteen. *See* USSG § 3E1.1(b). Unlike the vast majority of serious felonies typically before this Court, the guidelines in the present case are so low that the Court – and the Court alone – will determine acceptance of responsibility.

Hence, at least under the guideline analysis, a plea on April 23 will produce the identical guideline range as a plea at the pretrial conference, or a plea on the Friday before a Monday trial. The two cases now before the Court are accordingly atypical,

___, 2008 WL 763770, *4 (9th Cir. Mar. 24, 2008).

1 because they do not involve a systemic guideline incentive for an early plea of guilt, or a
2 systemic guideline disincentive from going to trial.

3 By contrast, the ramifications of felony convictions on these charges are dramatic.
4 Mr. Ashiegbu is a licensed real estate broker, and his wife Linda Ashiegbu is a licensed
5 real estate agent. The Ashiegbu's are naturalized U.S. citizens. As licensed professionals,
6 they own a small mortgage and real estate business called New Era Mortgage. They rely
7 on their licenses for their sole income, and to support their four young children who live
8 with them in their home in Hayward: Chloe Ashiegbu, 12; Stanley Ashiegbu, 10; Britney
9 Ashiegbu, 6; and Chelsea Ashiegbu, 2.

10 Felony convictions will have disastrous affects on the Ashiegbu household and
11 their ability to work and support their children. It is likely that felony convictions would
12 cost both of these parents their professional licenses and their livelihood.

13 The plight of Ms. Doris Anyanwu is even more serious. Unlike the Ashiegbus,
14 Doris is not a United States citizen. As the Court knows, she has just had twin babies
15 (both of whom are presumably U.S. citizens). Doris Anyanwu is currently struggling with
16 immigration concerns. A *felony* conviction of the counts alleged in Ms. Anyanwu's
17 indictment could have very serious immigration consequences.

18 Caveats, of course, abound. The government has the right to seek to charge
19 additional conduct which may affect the guideline calculations. After *Booker*, *Rita*, and
20 *Gall*, this Court is empowered to sentence these defendants, upon conviction, to any
21 custodial term up to the statutory maximum term. As a broad summary of the case,
22 however, it is fair to observe that these three defendants have little to fear from trial, and
23 everything to lose by not fighting these charges.

24 **II. The Government's April 4, 2008 Letter Mooted the Bill of Particular** 25 **Motion**

26 As this Court predicted, the government's letter and exhibit list mooted at least one
27 defense motion. AUSA Danner's letter and exhibit list obviated any need for a Bill of
28 Particulars – at least as to Linda Ashiegbu. The government has stated its theory of

1 prosecution, identified specific alleged misstatements, and linked evidence with specific
 2 counts. The defense will rely upon the government's representations in this letter, and will
 3 not seek a Bill of Particulars in light of them.

4 **III. A Suppression Motion for Mrs. Linda Ashiegbu's Statements is** 5 **Necessary**

6 The April 4 filing reveals that Mrs. Linda Ashiegbu's statements to ICE Agent
 7 Brown will be a focal point of the government's case. *See Danner Letter of April 4th.* at 2
 8 ¶ ("In a Mirandized interview conducted by ICE Agent Lesley Brown . . . Linda Ashiegbu
 9 admitted to filling out the I-129 form); 2 ¶ 3 ("Linda has admitted to Special Agent
 10 Brown that she filled out this form); 3 ¶ 5 ("Linda Ashiegbu admitted to Special
 11 Agent Brown that she filed this tax return on Ms. May's behalf.)

12 At the status appearance on April 23, undersigned counsel will be requesting a
 13 briefing schedule for a motion to suppress defendant Linda Ashiegbu's statements to ICE
 14 Agent Lesley Brown.

15 **IV. Federal Rule of Criminal Procedure 15 Depositions Are Necessary, But** 16 **Could Easily Be Mooted**

17 As predicted at the last status appearance, this 0-6 month guideline case will
 18 require Rule 15 depositions in West Africa. Among the evidence identified by the
 19 government in its April 4, 2008 filing is a letter allegedly written from defendant
 20 Emmanuel Anyanwu to the Bishop of Owerri. *See Danner Letter, Exh. List* at 15, Bates
 21 ASH1723. The key passage of this letter states that Emmanuel Anyanwu was married to
 22 Chinwendu Okolo, a Nigerian woman who bore him at least one child. *Id.* This letter was
 23 unsigned, was apparently taken from a computer, and it is not clear that it was ever sent.

24 Similarly, the government intends to introduce "Emails and chats from L.
 25 Ashiegbu and E. Anyanwu found on computer at [Mrs. Ashiegbu's residence]. *Id.* at 44,
 26 Bates ASH0405-29. At trial, the government will contend that one of those e-mails from
 27 Mrs. Ashiegbu to Emmanuel Anyanwu (while still in Nigeria) instructs him on how to
 28 allocate funds that she is sending to him. *See id.* at Bates ASH0412. Specifically, the e-

1 mail instructs, “\$100 to Chinwendu and the baby. *Id.*

2 Based on this evidence, the government will argue at trial that Emmanuel
3 Anyanwu was married to Chinwendu Okolo and had a child by her *before* the American
4 citizen, Kevina Mays, traveled to West Africa to meet him. The government will further
5 argue that Emmanuel lied on immigration forms when he did not report the fact that he
6 had previously been married. Finally, the government will argue that Linda Ashiegbu was
7 aware her brother’s previous African marriage when she encouraged Kevina Mays to
8 travel to Nigeria and become romantically involved with Emmanuel.

9 Because the government has chosen to pursue these theories, whether Chinwendu
10 Okolo was, in fact, married to Emmanuel Anyanwu will become a central factual issue at
11 trial. There are two people who know if this marriage actually took place: Emmanuel and
12 Chinwendu. Because Emmanuel is a fugitive, a Rule 15 deposition is necessary to secure
13 Chinwendu Okolo’s testimony for trial. The defense will be seeking a briefing schedule
14 on its motion for Rule 15 depositions in West Africa at the appearance on April 23rd.

15 Alternatively, the defense would enter into a stipulation with the government that
16 there will be no reference to Chinwendu Okolo or any alleged previous marriage of
17 Emmanuel Anyanwu at trial. That stipulation would moot any need for extraordinarily
18 expensive and time-consuming depositions.

19 **V. Severance or *In Limine* Evidentiary Hearings May Be Necessary in**
20 **Linda Ashiegbu and Emmanuel Anyanwu’s Trial**

21 The government seems to be inadvertently conspiring with undersigned counsel to
22 make this very simple case as complex as possible. In the final page of its April 4th letter,
23 it warns of impeachment evidence that reveals Emmanuel’s earlier attempts to enter the
24 United States with the assistance of Andrew Ashiegbu:

25 In addition to the applications that form the basis of the above charges, Emmanuel
26 has tried other strategies to seek admission to the United States. For example, he
27 has sought entry on the basis that he is Andrew Ashiegbu’s son. (He is actually his
28 brother-in-law) These previous applications may be relevant as impeachment
evidence and are included in the attached list.

1 *Letter of Danner* at 4 ¶ 1.

2 In other words, the government may seek to introduce an alleged attempted
3 immigration fraud involving Andrew Ashiegbu and Emmanuel Anyanwu, in the trial of
4 Linda Ashiegbu. It is unclear if the government intends to do so if Emmanuel Anyanwu
5 remains a fugitive and Mrs. Linda Ashiegbu goes to trial next to an empty chair.

6 If, however, this impeachment evidence is admitted in the trial of Linda Ashiegbu
7 it raises a host of intriguing evidentiary concerns, including marital privileges, Rule 403
8 inquiries, and hearsay problems of exquisite complexity. In addition, the use of this
9 evidence in Linda Ashiegbu's trial will presumably require further Rule 15 depositions in
10 Nigeria, on the subject of the African offspring of Andrew Ashiegbu.

11 Counsel for Linda Ashiegbu is evaluating severance and Rule 15 motions relating
12 to the government's intended use of this evidence as impeachment material.

13 As with Chinwendu Okolo, this issue could be mooted with a stipulation from the
14 government that agrees that if Emmanuel Anyanwu is still a fugitive during Linda
15 Ashiegbu's trial this impeachment evidence would not be used.

16 **VI. The Defense Requests an Opportunity to Copy the Binder of**
17 **Documents Filed with the Court**

18 Along with its letter and exhibit list the government filed a binder of exhibits and
19 materials with the Court. It did not, however, provide a copy of that binder to the defense.
20 Undersigned counsel asked AUSA Danner to borrow her binder and make a copy; that
21 request was denied.

22 All of the materials in that binder were, presumably, previously disclosed in the
23 thousands of pages of discovery provided to the defense. It is, however, a better practice
24 to ensure that the Court and all parties are looking at an exact copy of the same materials
25 in the binder actually provided. The defense would respectfully request that the Court, or
26 the government, loan undersigned counsel its binder for an afternoon. Federal Defender
27 staff will make a copy for all three defense counsel.

28 //

Conclusion

The April 4 letter of AUSA Danner and the government's exhibit list for trial was a very productive way to narrow the issues for litigation. With the benefit of the government's filing, the defense will be seeking a briefing schedule for a more-limited range of motions when the parties appear for a status conference on April 23rd.

Dated: April 18, 2008

Respectfully submitted,

BARRY J. PORTMAN
Federal Public Defender

/s

STEVEN G. KALAR
Assistant Federal Public Defender